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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 613

THE BOARD OF PUBLIC INSTRUCTION OF PINELLAS COUNTY, FLORIDA, *et al.*,

Petitioners,

v.

LEON W. BRADLEY, JR., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the Court of Appeals (Pet. App. A. 17) is not yet reported. The decision of the district court is also unreported.

Jurisdiction

The decision of the Court of Appeals on rehearing was entered on July 28, 1970. The petition for certiorari was filed on September 1, 1970. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

Questions Presented

Whether the court of appeals was correct in ruling that a school board desegregation plan which resulted in 66% of the black pupils in the system attending fourteen all-black or virtually all-black schools, failed to meet the desegregation requirements of *Brown v. Board of Education*, 347 U.S. 483 (1954), and *Green v. County School Board*, 391 U.S. 430 (1968), where it appeared that substantially more desegregation could be obtained by such pupil assignment techniques as redrawing zone lines and pairing schools located in close proximity to each other.

Constitutional Provisions and Statutes Involved

Pertinent excerpts from the Fourteenth Amendment to the Constitution of the United States and the Civil Rights Act of 1964 are set forth at page 3 of the petition.

Statement

This school desegregation case was commenced in 1964 seeking an injunction to require the desegregation of the public school system of Pinellas County, Florida, a system which includes the City of St. Petersburg. Summary judgment against the defendant-petitioner Board of Public Instruction was entered January 15, 1965, and defendants were directed to prepare a plan to eliminate dual attendance zones based on race and to operate the schools on a racially non-discriminatory basis. In March, 1965, a plan based on geographic attendance areas was approved by the district court. Thereafter, the plaintiffs by several motions sought decrees to further and complete the process of establishing a unitary non-racial system. When plaintiffs (respondents here) filed a motion in December 1968 for

relief in accord with this Court's decision in *Green* v. *County School Board*, 391 U.S. 430 (1968), the school system was still largely segregated with virtually all-black schools (99% or more black) housing 86% of all black elementary pupils, 55% of black junior high students and 54% of black high school students.

In response to this motion, the district court required submission of a new plan by the board. Such a plan was filed; the plaintiffs objected to it; and the district court approved it following an evidentiary hearing by an order entered August 4, 1969. The court below described the results of implementation of this plan in 1969-70 as follows:

> During the 1969-70 school year, 12 elementary schools, one junior high and one senior high school served all-Negro or virtually all-Negro student bodies. Approximately 8,400, or 66%, of the 12,700 Negro students in the entire system at all levels attended all-Negro or virtually all-Negro schools (Petition A. 19).

On plaintiffs' appeal to the Fifth Circuit, the district court's conclusion that there was no feasible plan other than the school board plan was reversed. The Court of Appeals found that a number of the all-black schools "can be desegregated through pairing, grouping, and relocating of zone lines without creating impractical attendance zones or inordinate transportation problems" (Petition A. 23). The Court of Appeals undertook to consider various means of eliminating the all-Negro schools "while at the same time maintaining the neighborhood school concept of the school system" (Petition A. 20-21).[1] The court noted

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[1] For a description of the Fifth Circuit's "neighborhood school" concept applied by the Court of Appeals with varying results in more than a score of recent decisions see Brief for Petitioners in *Davis* v. *Board of School Comm'rs of Mobile County*, No. 436, O.T. 1970 at pp. 49-61.

that Pinellas County did not employ a "strict" neighborhood system based on equidistant zone lines between schools, but rather, employed zones "based on discretionary zone lines" (A. 21). The court said:

> We find that the situation can be greatly improved by pairing some schools located in close proximity to each other, as was done in *Mannings, supra* [*Mannings* v. *Board of Public Instruction of Hillsborough County*, 427 F.2d 874 (1970)] by redrawing the zone lines in several instances, and by grouping several schools into a common attendance zone. (Petition A. 21)

The amendments in the board's proposed plan which were ordered by the Fifth Circuit were projected to eliminate all but three of the all-black schools in the system, with the result that 14.2% (1,738) of the black children would be assigned to such schools.

ARGUMENT

This case involves important questions with respect to what are the requirements of a school desegregation plan which fulfills the requirements of *Brown* v. *Board of Education*, 347 U.S. 483 (1954), by providing to black children their rights to a desegregated education. However, this Court has already heard full arguments this term on the issues involved in this case. See, e.g., *Davis* v. *Board of School Commissioners of Mobile County*, Oct. Term, 1970, No. 436; *Swann* v. *Charlotte-Mecklenburg Board of Education*, Oct. Term, 1970, Nos. 281 and 349; *North Carolina State Board of Education* v. *Swann*, Oct. Term, 1970, No. 498; *McDaniel* v. *Barresi*, Oct. Term, 1970, No. 420. Consideration of the Mobile County, Alabama case, *supra*, in

particular, has required that this Court examine the desegregation doctrines developed by the Fifth Circuit in numerous recent cases similar to this case in its efforts to implement *Brown*. If the Court, in deciding the *Mobile* case and the other cases argued in October, fashions rules of general applicability to guide the lower courts in formulating and reviewing desegregation plans, it is entirely likely that such a decision will be a governing precedent for the Pinellas County system. In such event, the Pinellas County case ought, in the interests of economizing this Court's efforts, be next considered by the lower federal courts in light of this Court's forthcoming decision.

The petition does not present any legal arguments not fully briefed and argued in the *Mobile* and *Charlotte* cases, *supra*. The board's arguments based on the Civil Rights Act of 1964 have been rightly rejected by every federal appeals court which has considered them.[2] There is simply no warrant for the argument of the board that these provisions are in any respect a limitation on the power of the federal courts to remedy unconstitutional racial segregation. Sections 401 and 407 of the Civil Rights Act of 1964 simply do not prohibit the courts from doing anything, as the plain language of the law reveals. As Judge Butzner said in the *Charlotte* case:

> Those provisions are not limitations on the power of school boards or courts to remedy unconstitutional

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[2] See *Charlotte-Mecklenburg Bd. of Ed.* v. *Swann*, 431 F.2d 138 (4th Cir. 1970); *United States* v. *School District 151, Cook County, Ill.*, 404 F.2d 1125, 1130 (7th Cir. 1968); *United States* v. *Jefferson County Bd. of Ed.*, 372 F.2d 836, 880-881 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. den. sub nom. Caddo Parish School Bd.* v. *United States*, 389 U.S. 840 (1967); *United States* v. *Bd. of Trustees of Crosby Independent School Dist.*, 424 F.2d 625 (5th Cir. 1970); *Tillman* v. *Bd. of Public Instruction of Volusia Cty.*, 430 F.2d 309 (5th Cir. 1970); *Andrews* v. *City of Monroe*, 425 F.2d 1017 (5th Cir. 1970); *Monroe* v. *Board of Comm'rs of Jackson*, 427 F.2d 1005 (6th Cir. 1970).

> segregation. They were designed to remove any implication that the Civil Rights Act conferred new jurisdiction on courts to deal with the question of whether school boards were obligated to overcome *de facto* segregation. (*Swann* v. *Charlotte Mecklenburg Bd. of Educ.*, 431 F.2d 138, 146 (5th Cir. 1970).)

An extensive discussion of this point is contained in the briefs in *Swann* v. *Charlotte-Mecklenburg Board of Education*, Oct. Term, 1970, No. 281, Brief for Petitioners, pp. 65-66; Reply Brief for Petitioners and Cross-Respondents, pp. 32-40. The point is also discussed in the Memorandum of the United States as *Amicus Curiae*, in *McDaniel* v. *Barresi*, No. 420, this Term.

The board's argument that the Fifth Circuit decision below requires "racial balancing" and the classifying of pupils by race is mistaken, as an examination of that opinion will reveal. The Fifth Circuit plan would leave about 40 schools 100% white and three all-black. It is clear that the Fifth Circuit did not require that all schools have any balanced racial percentage. In view of this Court's decision in the *Green* case, *supra*, the court below was required to reject the board's argument that there is no affirmative duty to integrate the schools. (See Petition, pp. 12-13). The Fifth Circuit examined alternatives to the board's desegregation proposals in order to find a method of more nearly disestablishing the segregated system created pursuant to state segregation laws and practices. The Fifth Circuit merely ordered rezoning and pairing of nearby schools to accomplish more desegregation than the school board had proposed. Nothing in the petition for certiorari suggests that the board can meet the heavy burden of justifying its preference for less effective methods of desegregation. *Green* v. *County School Board*, 391 U.S. 430, 439 (1968).

Indeed, rather than requiring "racial balance" as the board complains, we believe the Fifth Circuit erred in not requiring sufficient desegregation in permitting the board to continue a number of all-black schools which might have been desegregated by techniques similar to those ordered. However, similar contentions have been made by the petitioners in the *Mobile* and *Charlotte* cases, and if this Court sustains those arguments, we trust that the principles announced by this Court will be applied to this and other pending cases by the appropriate lower federal courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be denied.

Respectfully submitted,

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